CHAREON POKPHAND JAYA FARM (M) SDN BHD A

v.

CHUNG LIN

HIGH COURT MALAYA, SHAH ALAM B
SURIYADI HALIM OMAR J
[CIVIL APPEAL NO: MT1-16-3-1998]
22 JULY 2005

LABOUR LAW: *Employment - Overtime pay - Whether an 'employee' - Whether 'engaged in manual labour' - Question of law - Whether use of person's hands merely incidental to utilisation of his intellectual expertise and technical knowledge - Employment Act 1955, s. 2(1), para. 2 of First Schedule* C

The plaintiff/respondent started work with the defendant/appellant as an 'electrical chargeman' on 16 September 1992. He was drawing a monthly gross income of RM2,820 and was able to claim 'overtime allowances'. On 21 December 1994, the plaintiff had a fall and he fractured his right foot. Thereafter, on 15 January 1996, he was promoted to the post of 'maintenance executive' and his monthly salary was adjusted to RM3,210. On 15 May 1996, the plaintiff tendered his notice of resignation. D E

On 3 July 1996, the plaintiff filed a claim against the defendant at the Labour Office, demanding RM34,316.97 in unpaid overtime for the period between 1 February 1993 and 31 March 1996. At the conclusion of the proceedings, the presiding labour officer made a finding of fact that the plaintiff had been 'engaged in manual labour', had done overtime work, and was, therefore, entitled to the said overtime claims. Dissatisfied, the defendant appealed to the High Court. F G

Held (allowing the appeal):

(1) The judgment of the Labour Court, with respect to its finding of fact, did not reveal a 'talking judgment' that could reflect the mind of the judge; it merely made general statements. (para 14) H

(2) What amounts to 'manual labour' is a question of law. There is no occupation that does not involve the use of a person's hands in one way or another. Ultimately, the court must I

decide whether the use of the person's hands in his work is merely incidental to the utilisation of his intellectual expertise and technical knowledge. For if so, then he cannot be said to be 'engaged in manual labour'. (paras 15 & 16)

(3) Even if the plaintiff had performed intricate electrical work, the physical aspect of such a job would have depended very much on the labour of his mind and his intelligence, and in the course of it he must have had to draw from the vast reservoir of his experience and knowledge. Indeed, not every piece of work that involves the use of a person's hands is considered manual labour within the intendment of the Employment Act 1955 ('the Act'). (paras 17, 18, 20 & 21)

(4) The plaintiff was not 'engaged in manual labour' within the meaning of para. 2 of the First Schedule of the Act. He was, therefore, not an 'employee' as defined under s. 2(1) of the Act. (paras 20 & 21)

[Plaintiff not entitled to claim overtime.]

Case(s) referred to:
Bound v. Lawrence [1892] 1 QB 226 ***(refd)***
Colgate Palmolive (M) Sdn Bhd v. Cheong Foo Weng & Ors [2002] 2 AMR 2107 ***(foll)***
J&F Stone Lighting & Radio Ltd v. Haygarth [1966] 3 All ER 539 ***(refd)***
Re Lithographic Artists [1918] 108 LT 894 ***(foll)***

Legislation referred to:
Employment Act 1955, ss. 2(1), 60(3)(a), (b), (c), 60A(2), (3)(a), 69, para 2 of First Schedule

For the appellant - R Visal (Claire Skelchy with him); M/s Shook & Bok
For the respondent - Ong Jong Yong; M/s William Leong & Co

Reported by Gan Peng Chiang

JUDGMENT

Suriyadi Halim Omar J:

[1] The respondent started off as an electrical chargeman with the appellant, effective on 16 September 1992, earning a monthly gross income of RM2,820. During the period working as an electrical chargeman he had claimed overtime allowances inclusive of food allowance. On 21 December 1994, while at work, he fell from a ladder resulting in injuries to his right foot ie, a closed

fracture on the right fifth metatarsal. On 15 January 1996 the appellant promoted him to the post of maintenance executive with effect from 1 January 1996. With that promotion his new monthly salary began with RM3,210, his promotion increment being RM150 and his annual salary increment at RM240. On 15 May 1996 the respondent sent his letter of resignation to the appellant effective 1 June 1996.

[2] On 3 July 1996 the respondent filed a claim for a sum of money against the appellant at the Labour Office registered as Kes Buruh 307/96. In that claim the respondent had claimed for non-payment of overtime claims, which included overtime claim for ordinary days, for weekends and for public holidays, in the sum of RM43.793.28 for the period from 1 February 1993 until 31 March 1996. This sum was later reduced to RM34.316.97.

[3] In the course of the proceedings at the Labour Office, the respondent testified that as an electrical chargeman, amongst others, he was in charge of maintenance, maintaining electrical breakdown, servicing electrical equipments, keeping clean the sub-station, trouble shooting and repairing electrical equipments.

[4] He was supplied with T-shirts, safety boots, ear plugs, a helmet and gloves. In the course of work he alleged that working overtime was necessary. Regretfully when he submitted his overtime claims, they were rejected by the Deputy General Manager, on the premise that he was not entitled to them. He further complained that other workers were successful in their overtime claims.

[5] In the cross-examination the respondent had testified that there was no change in the job functions despite the promotion. As an electrical chargeman carrying the salary of a chargeman, he was also the solitary worker at the place of work, responsible to carry out that job.

[6] At the conclusion of the trial on 10 January 1997, after hearing witnesses from the respondent and appellant, the presiding officer had made a factual finding stating that the respondent had been engaged in manual labour. It was also his finding that the respondent had done overtime work as required, and concluded further that he was entitled to the overtime claims in the sum of RM34.316.97. On 20 January 1997 the appellant employer filed a notice of appeal to the High Court against that decision.

[7] In the Memorandum of Appeal, amongst others, the appellant had stated that the Director General of Labour had erred in law in failing to appreciate that in law the respondent was not at all material times "engaged in manual labour" within the meaning of para. 2, First Schedule of the Employment Act 1955 (hereinafter referred to as the Act), and was therefore not an "employee" within the meaning of s. 2(1) of the Act. Putting it the other way round, the Director General of Labour should have found the respondent at all material time, not "engaged in manual labour" within the meaning of para. 2, First Schedule of the Act.

[8] Under the Employment Act 1955, no employee shall be compelled to work on a rest day unless, *inter alia*, he falls within the category of s. 60A(2) of the Act, in the like of the performance of which is essential to the life of the community, work essential for the defence or security of Malaysia and the like. In this case the respondent had claimed that he was legally permitted to do so and had indeed worked overtime. Even though parties had agreed that the respondent's salary did not fall within the context of para. 1 of the First Schedule of the Act, as his commencement salary was RM2,200 with the last drawn salary being RM3,210, the latter still contended that he was "engaged in manual labour" and thus an "employee within the meaning of the Act, and invariably entitled to overtime.

[9] For the computation of that overtime claim, the respondent's case pursuant to s. 69 of the Employment Act 1955, was brought under ss. 60(3)(c) and 60A(3)(a) of the latter Act. The relevant portions of these two last provisions respectively read:

> section 60(3)(c):
>
> For any work carried out in excess of the normal hours of work on a rest day by an employee mentioned in para. (a) or (b), he shall be paid at a rate which is not less than two times his hourly rate of pay; and
>
> section 60A(3)(a):
>
> For any overtime work carried out in excess of the normal hours of work, the employee shall be paid at a rate not less than one and half time his hourly rate of pay irrespective of the basis on which his rate of pay is fixed.

[10] The relevant question that must be answered is, whether the respondent will fall under ss. 60(3)(a) or (b) of the Act (it is not necessary to supply the provisions here), and to have that question answered the definition of employee needs to be resolved first. Section 2 (1) of the Employment Act 1955 supplies:

> 2(1) In this Act, unless the context otherwise requires:
>
> "employee" means any person or class of persons:
>
> (a) included in any category in the First Schedule to the extent specified therein; or
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> (b) in respect of whom the Minister makes an order under subsection (3) or section 2A; ... .

[11] The First Schedule supplies that an employee, amongst others, are:

1. any person who has entered a contract of service, with such wages not exceeding RM1,550 per month *[hence excluding the respondent whose wage was never less that RM2,200 per month]*;
2. any person who, irrespective of the amount of wages he earns in a month *[therefore step-siding the above strict wage requirement]*, is engaged in manual labour including such labour as an artisan or apprentice ...;
3. ...;
4. ...; and
5. ... .

[12] For purposes of the above mentioned First Schedule, "wages" means wages as defined in s. 2 of the Act, but shall not include any payment by way of commission, subsistence, allowance and overtime payment. Suffice if I merely state that the issue of "wages" did not arise in this case but primarily revolve on the poser of whether the respondent did fall under item "2" of the First Schedule.

[13] The Labour Court eventually had made a finding of fact, and had concluded that the respondent was "engaged in manual labour", and accordingly had pronounced that the respondent did fall under the definition of "employee" of the Employment Act 1955. In defence of its finding of fact the Labour Court merely delivered the following statement in the grounds of judgment:

A Daripada keterangan-keterangan yang diberi oleh kedua-dua pihak dalam kes ini, saya dapati tugas-tugas utama pengadu adalah seperti berikut (From the evidence supplied by both parties in this case, I found the main duties of the complainant as follows):

B in charge (of) maintenance, electrical breakdown, service of the electrical equipment and keep clean on sub-station, trouble shooting and repair work on electrical equipments.

Pada pandangan saya tugas-tugas utama tersebut adalah melibatkan penggunaan kedua-dua tangan. Dan tugas-tugas itu adalah tugas C primary, predominent, real and substantial dalam tugas sebagai Electrical Chargeman (In my view the main duties required the use of both hands. Those main duties are primary, predominant, real and substantial in the carrying out of the duties of the complainant as an electrical chargeman.)

D Saya juga berpendapat tugas-tugas pemakaian teknikal adalah tugas accessory dan incidental kepada tugas-tugas utama yang melibatkan penggunaan kedua-kedua tangan (I also am of the opinion that the advertence to technicality is accessorial and incidental to the duties that require usage of both hands).

E **[14]** To overturn a finding of fact is no easy matter for an appeal court, bearing in mind that the original court had the advantage of seeing, hearing and observing the demeanour of the witnesses and parties involved during the proceedings. It takes a rather obvious fundamental flaw in that finding or outright misdirection to F permit its setting aside. It is regretful to state that the judgment of the Labour Court, as regards the supposed finding unfortunately did not reveal a talking judgment that could reflect the mind of the judge, but had instead merely made general statements. That being so, the factual finding cannot be said to G be overwhelmingly convincing, and may not even be creditworthy hence the necessity on my part to allude to law and their requirements.

[15] Before proceeding further I need to establish the ground H rules and one of them is that what is "manual labour" is a question of law. I must not be bound by flashes of muscled bound men or women with dirty finger nails and sweaty bodies, toiling away under the hot sun, to qualify them to fall within the context of "manual labour", and thereafter erroneously arrive at a I conclusion. I cannot be stuck or bound by stereotype views or common usages of those words but must travel beyond that.

[16] Despite my attempts, regretfully I failed to identify any reasonable form of occupation that does not get the hands involved in some form or other. By analogy even a judge, who depends on his training and wisdom in the course of dispensing justice, cannot do without his hands when recording the evidence, opening the law books, handling the exhibits, and the like. Surely that judge cannot be said to be engaged in manual work, with his intellectual expertise merely incidental to his expertise and duties? It is my view that the decisive factor to be considered, especially when the expertise or technical knowledge and hands are required to work side by side, the court will have to decide which will be more primary or predominant. If the hands are merely incidental then it cannot be said that the worker has been engaged in manual labour. In *J&F Stone Lighting & Radio Ltd v. Haygarth* [1966] 3 All ER 539 the House of Lords had opined the following:

> The Act of 1961 neither prescribes nor defines any varieties of manual labour. It therefore someone is employed to work with his hands, so that in a realistic way it can be said that such work with his hands forms his main or predominant activity (as opposed to work with his hands which is merely incidental to or accessory to work which is not done), then he would be employed in manual labour. He would still be so employed even if his work required knowledge, skill or ability.

[17] On that premise, it is unsafe to accept the opinion of the Labour Office, which has not supplied a talking judgment, that an electrical chargeman who must inevitably possess immense knowledge on matters of electricity, who thereafter must ensure the smooth operation of a factory, and in the course of it avoid the possibility of death when carrying out his duties, is a manual labourer. Nothing may prevent the respondent from directing other employees to carry out the physical aspect of the work whilst he merely instructs them the mechanics of carrying out the job. Even if he were to personally perform an intricate job, such physical aspect of that job will depend very much on the labour of his brain, intelligence and in the course of it, drawing from his vast reservoir of experience and knowledge. Agreeably all manual labour demands the use of hands, but not all work that demands the usage of hands, must automatically fall within the purview of manual labour (*Bound v. Lawrence* [1892] 1 QB 226). I am thus unable to accede to the view of the Labour Officer without more that just because his hands were on the screwdriver the

respondent I must have been engaged in manual labour within the context of the Act. By analogy. I refer to *Re Lithographic Artists* [1918] 108 LT 894 at 986 where Warrington J had stated:

> No one could say that the work of an artist who painted an original picture, whether in oils or in water colours, was manual work ... . In doing this he necessarily uses his hands, but the use to which he puts them is not labour, because it involves no strenuous exercise of the muscles of his hand or arm. The real labour involved is labour of the brain and intelligence. A lithographic artist can no more be said to be engaged in manual labour than a Royal Academician who paints a portrait or landscape can be said to be engaged in manual labour.

[18] Needless to say, perhaps the rationale for an employee who earns more than RM1,500 not being entitled to overtime claims, must be founded on the reasoning that the basic wage is more than ample to reward him for any extra work done. Further, it is not everyday that a factory suffers major electrical break-downs, which demands long hours of attention even after working hours, from a well paid electrical chargeman. Any unsatisfied employee who is unhappy with such a financial arrangement is not prevented from tendering his resignation and seeking some gainful employment, which satisfies his financial requirements, somewhere else. In contradistinction, if a worker's wage is less than that statutory sum, then the shortfall may be covered by the overtime claim. But certainly no one will be entitled to unjust enrichment by a wage higher than RM1,500, but still permitted to claim overtime payments, unless he falls under para. 2(1) of the First Schedule. Why this is allowed by Parliament is not the issue here but suffice if I merely state that Parliament must have a very good reason for that.

[19] In *Colgate Palmolive (M) Sdn Bhd v. Cheong Foo Weng & Ors* [2002] 2 AMR 2107, a High Court case, the respondents had at all material times been in receipt of a salary in excess of RM1,500 and had also claimed overtime allowances from the appellant. One of the respondents in that appeal was an electrical technician, who had a chargeman's certificate, and had admitted that he was an experienced electrician. He performed the same duties as the current respondent under appeal before me. Faiza bin Tamby Chik J, had at the end of the case decided that the Director General of Labour had failed to appreciate the facts of the case, and had dismissed the overtime claims of the electrical technician respondent. The High Court had held that the latter was an

employee, who was a labourer of the brain and intelligence, whereupon the appeal by the defendant employer was allowed with costs. An appeal was lodged at the Court of Appeal by the electrical technician employee but dismissed thus affirming the High Court's decision.

[20] Having perused the evidence, the grounds of judgment and the submissions of both parties, I am satisfied that the respondent in this case was no mere manual labourer. He was a worker who laboured with his brain and intelligence, with the hands as being incidental in the performance of his duties. The fact that his wages exceeded RM1,500 every month, and surprisingly still promoted to a higher paid job despite a serious accident, amplified how irrelevant the physical aspects of his body were in relation to the performance of his duties. It must be borne in mind, common sense apart, and going by the evidence his job would entail climbing ladders and the like to accomplish his duties, and with an injured leg inhibiting his movements, surely a retrenchment is more the likely result than an increase in salary and an improvement in the company's hierarchy of workers.

[21] I must hasten to add that it is not in every case an employee, who carries the same title of electrical chargeman, automatically is disentitled from claiming overtime allowances. Every case must depend on its peculiar facts eg, if he is appointed as a 'chargeman', electrical technician or electrical chargeman, but receives less than RM1,500 in wages then he is still entitled to an overtime claim; but if he carries any of those titles with a wage of more than RM1,500 per month, but clearly the labour of the brain or intelligence as being incidental, as opposed to the prominent usage of his hands, then he is an "employee" in the context of the Act and may claim overtime allowances. Invariably the contractual agreement and cogent evidence will have to be some of the sources the court needs to allude to before arriving at any conclusion.

[22] To wind it up I therefore allow the appeal with costs and pronounce that the respondent is not entitled to the overtime claims.